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Managing Judicial Innovation in the European Court of Human Rights

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ABSTRACT

Since its establishment, the European Court of Human Rights has developed into a constitutionalist actor within and beyond the continent of Europe; a development that is in no small part due to judicial innovations, such as evolutive interpretation. Such innovation has resulted in a tension between the Court and the contracting parties that may conceivably call into question states' diffuse support for the Court. We argue that this tension is addressed by the Court by means of a nascent model of judicial self-restraint discernible from the Court's docket management, its cognisance of non-legal factors in particularly contentious cases, and its use of consensus-based interpretation. While arguably necessary, such a model is not cost-free; rather, it may have implications for the quality of the Court's decision-making and its standing in the eyes of other stakeholders, such as non-governmental organisations and complainants.

KEYWORDS: European Court of Human Rights, judicial self-restraint, judicial innovation, human rights, European consensus, admissibility

1. INTRODUCTION

Since its establishment in 1959, the European Court of Human Rights ('the Court') has developed into a constitutionalist actor within and beyond the continent of Europe; a development that is in no small part due to judicial innovations, such as evolutive interpretation. However, this development presents the Court with both an opportunity and a challenge. In terms of opportunity, it enables the Court to secure the European Convention of Human Rights (ECHR) as a meaningful and effective instrument for the protection of rights through innovative tools. Thus, the Convention, as applied by the Court, remains capable of responding to contemporary rights challenges across the 47 member states of the Council of Europe. More challenging, however, is the task of keeping these states on board as this development is taking place, because judicial innovation within the Court has led to claims that the Convention is being interpreted out of its original meaning so that the Court is illegitimately expanding it in substance and form to oblige states to do things far outside of the contemplation of the original framers and the literal meaning of the text.¹

Judicial innovation, especially that leading to the evolution of the Convention, has resulted in a tension between the Court and the contracting parties; a tension that we argue is addressed by the Court through its docket management, its cognisance of non-legal factors in particularly contentious cases, and its use of consensus-based interpretation. In essence, we argue, the patterns of activity discernible in the Court under these headings can be read as developing a nascent model of judicial self-restraint by the Court. Although these are mechanisms by which the risks and tensions emerging from judicial innovation are managed, we do not claim that such management is cost free. Rather, we draw out a number of

¹ The Contracting Parties have emphasised on a number of occasions that the Court is a system of human rights protection which is subsidiary to the national system and then the Court should not go too far with innovations. As a result of this international pressure Protocol 15 will amend the preamble to the ECHR to include references to subsidiarity and margin of appreciation. See, Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms.

implications of this management for the Court in the eyes not only of contracting parties to the Convention but also of other important stakeholders such as rights-bearers and non-governmental organisations (NGO) throughout Europe.

In this article we first explore the ways in which judicial innovation within the Court has led contracting parties to question its legitimacy, with possible negative implications for diffuse support (i.e. support for the institution rather than for particular decisions it may make). The potential costs of a loss of diffuse support are such that, we argue, some mechanisms of managing judicial innovation are critical and, indeed, are discernible in the jurisprudence of the Court. In this respect we then consider the ways in which the Court's docket management, cognisance of non-legal factors, and deployment of consensus decision-making can all be read as management mechanisms even though, as interviews undertaken with current and former judges of the Court suggest, the Court may not be consciously managing this tension thus. We then go on to consider the implications of this for the Court and most particularly for its jurisprudential development. Importantly, this article does not purport to question the legitimacy or desirability of judicial innovation (and especially evolution) *per se* in the Court. Rather we leave to one side these debates about judicial innovation (or activism, as it is sometimes called)² and instead simply classify such innovation as part of the Court's constitutionalist development of the Convention system.

2. JUDICIAL INNOVATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

A. Judicial Innovation and Constitutionalism

² See, for example, confronting views of Lord Hoffmann in Hoffmann, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 429 and the former President of the ECtHR, Luzius Wildhaber in Wildhaber, 'European Court of Human Rights' (2002) 40 *Canadian Yearbook of International Law* 310. For more detailed discussion see, Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1741.

The European Convention on Human Rights provides that it is the Court that has the ultimate interpretive authority as regards its provisions and their meaning.³ This interpretive power places the Court at the heart of the process of developing the Convention and elucidating on the precise nature of states' obligations under it. In developing the Convention, the Court has—perhaps inevitably—been innovative, especially in terms of guiding the Convention's evolution into a text and *acquis* with constitutionalist character within the European *ordre public*.

By judicial innovation we do not only mean (explicit and implicit) adoption and application of evolutive interpretation in the case law of the Court, but also the Court's approach to remedies,⁴ interim measures,⁵ procedure, and case management.⁶ These innovations have equipped the Court to cope with an increasing number of cases as the number of people and states in relation to which it can adjudicate has increased. Indeed, without these kinds of innovations it is difficult to see how the Court could effectively function, particularly as its constitutionalist character has evolved.

Wildhaber claims that the Court is now firmly constitutionalist, a label that for him captures the following developments: the Court's development from a bulwark against totalitarianism to something more akin to a domestic constitutional court adjudicating on quotidian issues of rights enforcement,⁷ its promotion of core constitutionalist values of democracy and human rights, and its use of constitutionalism as an analytical tool to

³ ECHR, Article 32(1).

⁴ For instance the ECtHR began to deploy Article 46 to place legal obligations on the state to introduce a reform focusing on a particular structural problem in the judgment. For more information, see Leach, 'No Longer Offering Fine Mantras to a Parched Child? The European Court's developing approach to remedies' in Follesdal, Peters and Ulfstein (eds), *Constituting Europe The European Court of Human Rights in National, European and Global Context* (2013) 142.

⁵ After years of reluctance the Court acknowledged the binding force of interim measures in the case of *Mamatkulov and Askarov v Turkey* Application No 46827/99 and 46951/99, Merits and Just Satisfaction, 4 February 2005.

⁶ Recent amendments in the Court's working methods have allowed it to successfully tackle the backlog of inadmissible cases.

⁷ Wildhaber, 'Rethinking the European Court of Human Rights' in Christoffersen and Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011) 204 at 226-7. See also, Bates, *The Evolution of the European Convention on Human Rights* (2010) at 270.

distinguish between adjudicatory decisions and more serious constitutionalist questions.⁸ On this reading, and for our purposes, constitutionalism within the ECHR is both a process and a value. As a *process* it relates to the development of the Convention and the Court in line with core constitutionalist principles of respect for law, limitation of power, and accountability. As a *value* it expresses a commitment to supporting and implementing a pan-European framework within which those principles are operationalised. In both senses, the Court is a key constitutionalist actor, articulating common minimum standards that are the least one can expect to enjoy when within the jurisdiction of a member state by means of judicial innovation including evolutive interpretation.⁹ As Judge Rozakis writing extra-judicially has put it, the Court's task is one of integration: of 'attempting to create a coherent body of human rights rules that apply indiscriminately in the sphere of the legal relations of all of the states parties to the Convention'.¹⁰

It seems inevitable that the fulfilment of this task would require some judicial innovation, particularly inasmuch as it involves ensuring the Convention is fit-for-purpose in the contemporary world and, concurrently, that states remain 'on board' as the Convention text is developed into broader principles of rights protection. That is, however, a challenging task, especially when it involves the Court in going beyond what the member states consider its legitimate boundaries to be, thus allegedly 'distorting' the plain meaning of the Convention.¹¹ In such circumstances, states' support for the Court can appear to begin to

⁸ Wildhaber argues that this understanding of constitutionalist nature of the Court is the reaction to the overwhelming backlog of mostly inadmissible and repetitive applications. Wildhaber, *supra* n 7 at 226-7. See also, Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (2006); de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) *European Human Rights Law Review* 38, Greer and Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655.

⁹ de Londras, 'International Human Rights Law and Constitutional Rights: In Favour of Synergy' (2009) 9 *International Review of Constitutionalism* 307.

¹⁰ Rozakis, 'The European Judge as Comparatist' (2005) 80 *Tulane Law Review* 272, *cf* Petkova, 'Three Levels of Dialogue in Precedent Formation at the CJEU and ECtHR' in Dzehtsiarou et al. (eds), *Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR* (2014) 73 at 73.

¹¹ The Court has often resorted to activist reading of the Convention which was criticised by the judges, lawyers and states' officials. The Court has effectively extended the ECHR by including right to access court to Article 6

decline, indicated by the emergence of negative language to describe judicial innovation: in such circumstances ‘development’ becomes ‘distortion’, ‘evolution’ becomes ‘activism’ (negatively understood), and the language of illegitimacy emerges.

B. Legitimacy Deficit as a By-product of Constitutionalism

Legitimacy is, of course, a complex concept, but for our purposes it can be described as respect and support for the Court emanating from stakeholders’ confidence that the Court will decide cases consistently, in a manner that respects the nature of both the Convention (as a human rights instrument) and its jurisdiction (as subsidiary and limited), and by reference to appropriate materials considered within a methodologically sound framework. This conception of legitimacy is clearly connected to diffuse support for the Court, i.e. to the building of a favourable disposition towards the Court *per se* so that stakeholders will concede its authority even to make decisions with which they disagree.¹² To a large extent, however, whether or not someone considers that a decision or process adheres to these principles and is legitimate is bound up with their standpoint and desired outcome. The activist human rights campaigner might consider it wholly illegitimate for the Court to refuse to say, one way or another, whether there is a right to access an abortion in the absence of medical need under the Convention (for example), whereas a state party might say that the Convention purposefully fudges the matter (by the general nature of Article 2) and that it is a question of such moral disagreement that it is not for a subsidiary international human rights court to identify a minimum right by means of some kind of jurisprudential alchemy.

of the Convention (right to fair trial) in famous *Golder v the United Kingdom*. This activist decision-making was considered illegitimate even by some judges of the ECtHR. See, *Golder v the United Kingdom* Application No 4451/70, Merits and Just Satisfaction, 21 February 1975 dissenting opinion of Judge Fitzmaurice. See also, Bates *supra* n 7 at 309-14. Among other examples it is worth mentioning spreading Article 8 of the Convention onto environmental issues (see, *López Ostra v Spain* Application No 16798/90, Merits and Just Satisfaction, 9 December 1994 and *Hatton and Others v the United Kingdom* Application No 36022/97, Merits and Just Satisfaction, 8 July 2003) and Lord Hoffmann’s reaction to it (see, Hoffmann, *supra* n 2).

¹² Easton, *A Systems Analysis of Political Life* (1965).

It is the fact that there will sometimes be dissonances in what different stakeholders consider legitimate that makes innovation such a risk-laden business for the Court, especially in relation to these contentious issues.¹³ As the different stakeholders go, however, the Court has a particular need to maintain functioning relationships with contracting parties, i.e. states. This is because states are prominent actors in on-going reform efforts,¹⁴ central to the resourcing of the Court's structure and institutional architecture, and critical actors in the processes of enforcement and execution of judgments. In this respect, individual states are both responsible for the execution of adverse judgments against them *and* play a more general role as members of the Committee of Ministers, which has a supervisory role in the execution of judgments.¹⁵ Taking this into account it is clear that Court has rather a lot to lose if states (and particularly high-compliance states) begin to withdraw support and/or seriously question its legitimacy. This is not to suggest that states would withdraw *en masse* or that the Court would somehow cease to function, but rather that a discourse of illegitimacy might emerge that has the potential to destabilise the Court and set the conditions for selective non-compliance even by high compliance states.¹⁶

The question of why the Contracting Parties comply with the judgments of the ECtHR is not a trivial one and has generated plentiful legal and political scholarship.¹⁷ It is

¹³ Bodansky argues that 'Governmental actors, for example, may have different views about legitimacy than members of civil society. They may put a much greater premium on sovereignty and consent, while civil society organizations may place much greater emphasis on participation and transparency. As a result, factors that may help to legitimise an institution in the eyes of non-state actors may help to delegitimise it in the eyes of state-actors.' Bodansky, 'The Concept of Legitimacy in International Law' (2008) 04-013 *UGA Legal Studies Research Paper* at 5-6, available at: ssrn.com/abstract=1033542 [last accessed 29 December 2014].

¹⁴ See, the declarations adopted at Interlaken Izmir and Brighton on reform of the Court: Interlaken Declaration (19 February 2010), Izmir Declaration (27 April 2011) and Brighton Declaration (20 April 2012).

¹⁵ See, ECHR, Article 46. For a more detailed discussion of the role of the Committee of Ministers see, Çali and Koch, 'Foxes Guarding the Foxes? The Peer review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.

¹⁶ In this respect it is now seriously mooted in the United Kingdom that Parliament might decide on a case-by-case basis whether to comply with decisions of the Court against the United Kingdom, rather than compliance being an expected part of domestic politics just as it is a clear expectation under Article 46(1) of the Convention itself.

¹⁷ See, for example, Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, Dothan, 'How International Tribunals Enhance

plausible to suggest that different Contracting Parties have different reasons for complying with the Court's judgments and that these reasons sometimes might, in fact, have little or nothing to do with the content of the judgments themselves. They might, rather, relate to international pressure,¹⁸ the existence of specific sanctions,¹⁹ perceived independence of the tribunal,²⁰ or national political context and state practice.²¹ However, the Court's reasoning and its 'behaviour' can increase the likelihood that a judgment will be executed and accepted by the respondent state and thus increase the legitimacy of the judgments of the Court. Furthermore, mechanisms of reasoning can provide a public justification for decisions as to (non)compliance. This article analyses those aspects of the Court's behaviour that are capable of enhancing legitimacy without putting the constitutionalist mission of the Court under peril.

C. Judicial Innovations and Maintaining the Legitimacy of the Court

Judicial innovation is a manifestation of the Court's constitutionalist function which is capable of undermining the legitimacy of the Court in the eyes of states parties. At the core of states' criticism of judicial innovation in the ECtHR is the claim that it engages the Court in going beyond its original remit and exceeding the jurisdiction conferred upon it by their original consent and, thus, is illegitimate. While more than fifty years of judicial operation in and jurisprudential development by the Strasbourg Court might suggest that original consent

Their Legitimacy' (2013) 14 *Theoretical Inquires in Law* 455, Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14 *Theoretical Inquires in Law* 437.

¹⁸ See, Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), B Simmons, 'Compliance with International agreements' (1998) 1 *Annual Review of Political Science* 75.

¹⁹ Chayes and Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (1998) at 29-108.

²⁰ Huneeus, 'Compliance with Judgments and Decisions' in Alter, Romano, Shany (eds), *Oxford Handbook of International Adjudication* (2014) 437 at 453.

²¹ Shany 'Assessing the Effectiveness of International Courts: A Goal-based Approach' (2012) 106 *American Journal of International Law* 225 at 261. Huneeus, *supra* n 20 at 354-7.

is of limited relevance to a consideration of the Court's legitimacy,²² states continue to return to it (expressly or impliedly) in their critiques of the Court.²³

Of course it is important to acknowledge that, in the main, contracting parties comply with the Convention and execute judgments handed down against them because they recognise that this is part and parcel of being contracting parties to the Convention and members of a European community of states. In other words, contracting parties have agreed to be part of the system and through that agreement they have consented to the jurisdiction of the Court making its exercise of jurisdiction *prima facie* legitimate.²⁴ Thus, states execute the Court's judgments that are binding upon them (i.e. judgments in which the state is a respondent) at least partly because they agreed to do so. However, where the Court finds against a state by using innovative judicial techniques such as evolutive interpretation, states will sometimes dispute the legitimacy of this on the basis that it goes beyond their original consent.²⁵ Even high compliance states such as the United Kingdom that generally exhibit a substantial amount of diffuse support for the Court can thus experience dips in this support in reaction to such decisions, as we have seen in the context of prisoner voting to which we return below. The Court cannot be blind to the risk that such reduction in support might lead to a deterioration of the vital relationship between it and member states; indeed, this seems to have led some judges to express concern about the potential costs of the Court employing

²² Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 *European Journal of International Law* 304.

²³ In 2009 Lord Hoffmann points out that 'it would be valuable for the Council of Europe to continue to perform the functions originally envisaged in 1950, that is, drawing attention to violations of human rights in Member States and providing a forum in which they can be discussed'. Hoffmann, *supra* n 2 at 431. It would appear that this is primarily so when politicians speak about the legitimacy of the Court; see, Çali, Koch and Bruch 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (2011), available at: ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf [last accessed 29 December 2014].

²⁴ Letsas has reconceptualised legitimacy based on consent into legitimacy based on commitment. While the two are similar the Letsas' approach captures well the continuing nature of human rights conventions that do not intend to freeze the status quo at the moment of ratification but is effective only if reflects societal developments. Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Follesdal, Peters and Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 106.

²⁵ See, *eg*, David Cameron's speech to the Parliamentary Assembly of the Council of Europe, 25 January 2012, available at: www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights [last accessed 29 December 2014].

innovative techniques to too great a degree. For example, Judge Myjer (former ECtHR judge elected in respect of the Netherlands) said:

I am one of those who believe that the biggest danger for the Court is that it turns into a purely academic church of human rights believers, who say that we preach the new Gospel of human rights....The point is that we have the Convention which was meant to say that what happened in WWII should not happen again. There are minimal values and rights that should be protected and if these minimal rights are violated, we give citizens the right to complain to an international court. I am very much in favour of a rather restrictive approach of the Court and we should take care to not overestimate ourselves.²⁶

In our view the danger that Judge Myjer refers to is properly seen as the cost of a reduction in diffuse support from contracting parties, which would hamper the Court in its attempts to be innovative in the development of the Convention so that it can act effectively as a constitutionalist instrument. We claim that the management of the Court's docket, being cognisant of non-legal factors, and the deployment of 'consensus' decision-making by the Court are all techniques deployed in order to effectively manage the tension that emerges from judicial innovation in the Court. It is to these that we now turn.

3. MANAGEMENT OF THE COURT'S DOCKET

All courts engage in docket management processes of some kind, and judges are often to the forefront of this in their making of threshold decisions as to whether or not a case is to be heard at all. It has long been accepted that the management of cases—or the management of the list or the docket—is not a neutral exercise but rather has the capacity to shape a Court's work in a substantive way.²⁷ This is perhaps especially so in systems where the court in

²⁶ Dzehtsiarou, Interview with Judge of the ECtHR Egbert Myjer (2009).

²⁷ See, Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374.

question has a fairly sweeping capacity to decide on what it will hear, either through something like the selective jurisdiction of the US and UK Supreme Courts or, as in the case of the ECtHR, through the application of admissibility rules in a non-bureaucratic manner.²⁸ In addition, the ECtHR has a further discretion which is as to whether or not to convene the Grand Chamber to hear a case and, in so doing, whether to facilitate a decision emanating from the most authoritative formation of the Court. In deciding on admissibility and on convening the Grand Chamber, the ECtHR is determining to some extent the canvas that it will paint on; it is deciding whether to take cases that are high risk from the perspective of judicial innovation. Docket management is, then, an important tool for the ECtHR in managing the tension between innovation and support.

A. Admissibility

The ECtHR has a wide-ranging set of admissibility rules, not only for the purposes of making its workload manageable but also in recognition of the Court's nature as a subsidiary court. These range from what might appear to be relatively innocuous admissibility requirements (such as the requirement that the complaint not be anonymous,²⁹ or the six-month time limit³⁰) to those that are more akin to rules allowing proxy judgment on the merits (perhaps most notably the requirement that an application should not be manifestly ill-founded).³¹ Although sometimes classed as a merely bureaucratic process, Andrew Tickell has persuasively argued that the administration of these admissibility criteria by the Court is in fact often an exercise of substantive judgement.³² This reflects the fact that, in applying its admissibility rules, the Court has always exercised a substantial amount of flexibility, even in

²⁸ On the applicability of admissibility rules in bureaucratic v substantive judgement manners see, Tickell 'Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights' (2011) 12 *German Law Journal* 1786, drawing on Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1985).

²⁹ ECHR, Article 35(2)(a).

³⁰ ECHR, Article 35(1).

³¹ ECHR, Article 35(3)(a).

³² *Ibid.*

respect of what might appear to be the most straightforward of rules.³³ For example the Court was able to determine admissibility at least partially by reference to factors such as the perceived severity of the alleged violation which suggests its capacity to use admissibility as a management tool. Rules of admissibility can be disregarded if a constitutionalist issue is at stake. In *Ilhan v Turkey*, for instance, the ECtHR stated that ‘the rules of admissibility must be applied with some degree of flexibility and without excessive formalism. Regard must also be had to the object and purpose of those rules and of the Convention generally, which, as a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective’.³⁴

The potential for tension management through admissibility decisions has arguably been enhanced by the introduction of new rules with a focus on the nature of significance of the alleged violation, namely the adjustment of Article 35(3)(b) by Protocol No 14. Following that adjustment, Article 35(3)(b) now reads

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.³⁵

³³ For example 6-months (soon to be 4-months) rule or prohibition of anonymity.

³⁴ *Ilhan v Turkey* Application No 22277/93, Merits and Just Satisfaction, 27 June 2000, at para 51.

³⁵ The Brighton Declaration proposes amendment of this Article to remove the phrase ‘and provided that no case... tribunal’; Brighton Declaration, supra n 14 at para 15.

On the face of it, this appears to be a criterion that is intended to allow the Court to be more selective by filtering out less important cases (with importance being determined by using significance of disadvantage as a proxy), thus allowing it to focus on cases that might be said to have more potential for development of the Convention.³⁶ Whenever the question of significant disadvantage is considered by the Court³⁷ as a matter of admissibility an underlying claim is being made that reflects the tension that we are concerned with here. The implicit claim is either (i) that the disadvantage suffered is so significant that a refusal to hear the case when it is otherwise inadmissible would be unjustifiable on constitutionalist grounds, even if its resolution requires judicial innovation and (ii) that the disadvantage suffered is so insignificant (thus the case does not raise ‘real’ constitutionalist questions) that even compliance with the other admissibility grounds ought not to be sufficient for the Court--overburdened and in need of rationalising its workload as it is--to agree to hear it.³⁸ Moreover, the Convention puts an obligation on the Court to consider the consequences for the constitutionalist development of the Convention of declaring the case inadmissible due to there being no significant disadvantage. Pursuant to Article 35, the ECtHR should not deploy this admissibility criterion if respect for human rights requires examination of the case. Thus, it seems that if the issue is of *prima facie* constitutionalist importance, lack of significant disadvantage becomes irrelevant. This, of course, raises the question of what is meant by the phrase ‘significant disadvantage’. The Court summarised its understanding of this criteria in *Shefer* as follows:

³⁶ The history of the introduction of this new criterion points to its attempt to achieve all of these things: Buyse, ‘Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR’ in McGonigle Leyh et al. (eds), *The realization of human rights: when theory meets practice. Studies in honour of Leo Zwaak* (2013), available at: ssrn.com/abstract=2244283 [last accessed 29 December 2014]. Moreover, this capacity will be furthered by Protocol 15 which will remove one of the restrictions from Article 35(3)(b) in its Article 15, which will allow the Court to declare cases inadmissible due to lack of significant disadvantage even if such case ‘has not been duly considered by a domestic tribunal’.

³⁷ This new admissibility criterion can be raised by a respondent government or by the Court on its own motion (*Ionescu v Romania* Application No 36659/04, Admissibility, 1 June 2010).

³⁸ This is also suggested by the Explanatory Report to Protocol No. 14 (CETS No. 194), at para 77.

The general principle *de minimis non curat praetor* underlies the logic of Article 35 § 3 (b), which strives to warrant consideration by an international court of only those cases where violation of a right has reached a minimum level of severity. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision...³⁹

Not only does this quotation from *Shefer* state that merely technical violations (a characterisation that is not neither self-explanatory nor objectively determinable) ‘do not merit’ the attention of the Court, but it suggests that considering such violations would be illegitimate by reference to the Court’s subsidiary character. The Court’s attention and innovative capacities are to be left for more ‘significant’ matters than these.

B. Hearing a Case in the Grand Chamber

Unlike admissibility criteria that protect the court from low importance claims but can be disregarded if there is a constitutionalist issue at stake, transfer of the case to the Grand Chamber is a mechanism for highlighting legal disputes that are considered to be of particular importance by the Court. The Grand Chamber is the largest formation of the Court, comprising seventeen judges including the President and Vice-Presidents of the Court and Presidents of the Sections.⁴⁰ It enjoys a very selective jurisdiction, making it a key instrument for use by the Court in selecting venues for innovation to establish, promote and emphasise constitutionalist values,⁴¹ as illustrated by how a case comes to be heard by the Grand

³⁹ *Shefer v Russia* Application No 45175/04, Admissibility, 13 March 2012, at para 18.

⁴⁰ See, ECHR, Article 26(5). The President, Vice-Presidents and the Presidents of the Sections are the most experienced and respected judges of the Court. They are elected by the plenary Court. See, ECHR, Article 25.

⁴¹ Dzehtsiarou and Greene argue that while the Grand Chamber is predominantly dealing with constitutionalist matters, some of them are still dealt with by the Chambers. See, Dzehtsiarou and Greene ‘Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism’ (2013) *Public Law* 717.

Chamber. This happens either by relinquishment to the Grand Chamber under Article 30, or by a referral following a decision in a Chamber under Article 43.⁴²

Relinquishment takes place without any substantial involvement of the parties to the case; rather whether or not the matter in hand ought to be determined by the Grand Chamber is decided by the judges of the Chamber considering the case. At present, the parties to the case have a veto power over relinquishment, however that will be abolished with the coming into force of Protocol 15.⁴³ Then the Chambers will be able to relinquish any case to the Grand Chamber regardless of the preferences of the parties involved.

Referral to the Grand Chamber is somewhat more participatory, although the decision still lies with the Court itself. Here, a party to a case can refer it to the Grand Chamber once the original decision has been made in a Chamber of seven judges. A panel of five senior judges of the ECtHR then decides on the referral request.⁴⁴ As a general trend, the success rate of such requests is very low: by means of example, in 2012 less than 4% of them were successful in having the case referred.⁴⁵ Generally speaking only a small number of cases are successfully referred to the Grand Chamber in a year, and the panel does not provide reasons for rejection. Taking into account the broadly defined criteria for referral and very low success rate out of a significant number of requests,⁴⁶ one can argue that here, as well as in cases of relinquishment, the Court ultimately controls the Grand Chamber docket by selecting only exceptional cases for consideration. These cases then become candidates for

⁴² ECHR, Article 30.

⁴³ Protocol No 15 to the ECHR, Article 3.

⁴⁴ ECHR, Article 43.

⁴⁵ In 2012 for example the panel of 5 judges has considered 185 referral requests and accepted only 7 of them. *Annual Report* (European Court of Human Rights 2013). Between 2011 and the summer of 2014, research conducted by Fiona de Londras indicates that the Panel considered 677 applications for referral, only 39 of which were accepted. Original data and analysis on file with Fiona de Londras. Prior to 2011, when press releases about the decisions of the Panel began to be published, the success rate for referrals was a mere 5.16%: European Court of Human Rights, *The General Practice Followed by the Panel of the Grand Chamber when Deciding on Requests for Referral in Accordance with Article 43 of the Convention* (2011), at 4.

⁴⁶ Over last 6 years the lowest number of requests was submitted in 2012 (185) and the highest number in 2009 (356).

judicial innovation, especially where they involve the Grand Chamber in significantly developing the previous jurisprudence of the Court on a particular matter (including developing its own previous position on an issue⁴⁷). Although no reasons are given in individual cases for rejection or acceptance of a referral request, the Court did release a practice note in 2011 outlining that '[c]ases that will be sent to the Grand Chamber are likely to' be (a) cases affecting case-law consistency, (b) cases which may be suitable for development of the case law, (c) cases suitable for clarifying principles from existing case law, (d) cases in which the Grand Chamber might re-examine a jurisprudential development endorsed by the Chamber, (e) cases concerning 'new' issues, (f) cases raising a 'serious issue of general importance', and (g) 'high-profile' cases.⁴⁸ This clearly suggests that the constitutionalist opportunity—and space for judicial innovation—that a case presents are relevant to decision as to whether or not to accept the request for referral and, thus, to allow the Grand Chamber to decide on the case.

The Court must be particularly cautious in opening up space for judicial innovation in the Grand Chamber because decisions of the Grand Chamber carry a particular weight within the Convention system, so that innovation at that level can attract particular criticism from states. This is so because decisions of the Grand Chamber are the Court's final word on the issue; the dispute is not subject to any further appeal.⁴⁹ This partially explains the configuration of the Grand Chamber, which is the second important factor here. As noted above, the Grand Chamber consists of seventeen judges including the President and Vice-

⁴⁷ See, for example, *Christine Goodwin v the United Kingdom* Application No 28957/95, Merits and Just Satisfaction, 11 July 2002 in which the Court changed its position from *Sheffield and Horsham v the United Kingdom* Application No 31–32/1997/815–816/1018–1019, Merits and Just Satisfaction, 30 July 1998 and *Vilho Eskelinen v Finland*, Application No 63235/00, Merits and Just Satisfaction, 19 April 2007 in which the Grand Chamber displaced its recent decision in *Pellegrin v France* Application No 28541/95, Merits and Just Satisfaction, Judgment of 8 December 1999.

⁴⁸ European Court of Human Rights, *The General Practice Followed by the Panel of the Grand Chamber when Deciding on Requests for Referral in Accordance with Article 43 of the Convention* (2011) at 6-13.

⁴⁹ See, ECHR, Article 44.

Presidents of the Court and Presidents of the Sections meaning that,⁵⁰ when compared with Chambers of seven judges,⁵¹ it arguably offers a more authoritative decision of an issue. Third, the selection of cases is made according to their importance to human rights protection and to the interpretation of the Convention or when there is a possibility that a previous precedent of the Court will be overruled.⁵² These criteria are broad and, as outlined above, the cases are selected by the judges exercising their discretionary powers. Thus, the selection of cases for the Grand Chamber seems to reflect what the judges think the truly important constitutionalist human rights issues in Europe are at the material time so that judicial innovation occurs in cases that the Court considers require its attention, in spite of the potential associated legitimacy costs. Fourth, the Grand Chamber tends to deliver no more than 30 judgments per year meaning that it is quite possible to keep track of these judgments⁵³ which are usually better covered in the media than the large number of decisions emanating from the Chambers.

Thus, the Court can emphasise a particular issue by promoting a case to the Grand Chamber level. Moreover, the Court executes control over the Grand Chamber docket and whether a case ends up in the Grand Chamber is not heavily dependent on the will of the parties involved but rather, we contend, on the Court's instinct as to whether a Grand Chamber decision developing the Convention jurisprudence on the matter at hand is sufficiently necessary and appropriate to bear the cost of opening up space for judicial innovation on the matter.

4. COGNISANCE OF NON-LEGAL FACTORS

⁵⁰ See, ECHR, Article 26(5). The President, Vice-Presidents and the Presidents of the Sections are the most experienced and respected judges of the Court. They are elected by the plenary Court. See, ECHR Article 25.

⁵¹ The Chambers is formed of 7 judges (ECHR, Article 26(1)).

⁵² ECHR, Articles 30 and 43.

⁵³ The Chambers deliver substantively more judgments. For example, in 2012 the Sections delivered 861 Chamber judgments. Annual Report, *supra* n 45 at 62.

Although independent,⁵⁴ courts are not entirely insulated from the broader political context in which they operate. Indeed some have even gone so far as to say that courts are properly understood as political actors.⁵⁵ However, one does not have to subscribe to this view to see that there is a trend of courts taking non-legal factors into account in their decision-making. Whether this is acceptable or not is, of course, a matter of contention and, as with many things, depends to a large extent on the standpoint and interests of the person making the assessment. In its day, the Commission escaped neither the tendency to be cognisant of non-legal factors⁵⁶ nor the criticism this can elicit from scholars and activists.⁵⁷ However, the capacity and willingness of the Court to take at least some account of broader issues of context is likely to feed into states' assessment of decisions reached through judicial innovation and, consequently, diffuse support for the Court. Indeed, the call in the Interlaken Declaration for the Court to 'take fully into account its subsidiary role in the interpretation and application of the Convention'⁵⁸ contains within it an implicit appeal for such cognisance, which appears to be granted in situations where the Court considers that there is an especially notable strength of feeling either within the respondent state or across member states, and in relation to issues where states have particularly sovereigntist (and anti-internationalist) inclinations such as national security.

A. Strength of Domestic or International Feeling

⁵⁴ Dzehtsiarou and Coffey 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights' (2014) 37 *Hastings International and Comparative Law Review* 271.

⁵⁵ For a classical articulation of this thesis see, for example, Becker, *Comparative Judicial Politics: The Political Functionings of Courts* (1970).

⁵⁶ See for example, *The Greek Case* Application No 3321/67, 3322/67, 3323/67, 3344/67, Admissibility, 18 November 1969.

⁵⁷ Lorenzo Zucca, for instance, criticised the fact that the Court placed too much emphasis on non-legal factors in reaching its Grand Chamber judgment in *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 18 March 2011. He points out that 'what the ECtHR does not seem to understand is that its legitimacy as an international court of human rights also crucially depends on the quality of its reasoning, which should be regarded as exemplary in articulation and depth. Without those qualities, any decision is a defeat for justice even if it may be a Pyrrhic victory for institutional respectability' Zucca, 'Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber' (2013) 11 *International Journal of Constitutional Law* 229.

⁵⁸ Interlaken Declaration, *supra* n 14 at para 9.

In some, relatively limited, cases the Court appears to be willing to allow an apparent strength of feeling as to a particular issue to influence its decision as to the compatibility of the impugned state action with the Convention, often through the innovative development of pre-existing doctrines to allow for such views to be effectively considered. This is especially the case where the issue at hand is said to reflect an important element of national identity. Thus, in *Leyla Sahin v Turkey* the Court found that prohibiting the wearing of Islamic headaddress in universities was justifiable and not a violation of Article 9 by reference to the secular constitutional identity of the state.⁵⁹ In somewhat less explicit ways, the decisions of *Lautsi v Italy*⁶⁰ (on the display of crucifixes in state school classrooms) and *A, B and C v Ireland*⁶¹ (relating to the availability of abortion) both illustrate the court's sensitivity to the respondent state's claims as to the strength of national feeling or the national narrative around the issue at hand. In both cases there seems to have been an unwillingness to innovate and develop existing jurisprudence in order to push a constitutionalist line into areas in which the respondent states had entrenched positions, determined by apparent national narratives and relating to questions of moral contestation about religion in the public sphere and reproductive autonomy. This unwillingness is not explicable by the disadvantage experienced by the complainants being in some way 'insignificant' by reference to either objective or subjective factors,⁶² but rather it seems to us by a tacit acceptance that there are some fields in which a contracting party is likely to find judicial innovation leading to constitutionalist intervention by Strasbourg to be illegitimate and, as a result, into which the Court will be reluctant to tread. In the case of *A, B and C v Ireland* this resulted in the development by the Court of a doctrine of 'trumping internal consensus' which allows for a respondent state to claim that, *notwithstanding* the existence of European consensus on a matter, an internal

⁵⁹ *Leyla Şahin v Turkey* Application No 44774/98, Merits and Just Satisfaction, 10 November 2005.

⁶⁰ *Lautsi v Italy*, supra n 57.

⁶¹ *A, B and C v Ireland*, Application No 25579/05, Judgment of 16 December 2010.

⁶² See, *Shefer v Russia*, supra n 39.

(domestic) consensus exists and can be verified within the respondent state that is sufficient to justify divergence from, and therefore trumps, the identified European consensus.⁶³

Where the Court receives an indication that a number of states across the Council of Europe are inclined towards a particular outcome in a case that is before it this can also act as a non-legal factor that influences the decision reached and acts as a brake on innovation. Thus, multiple interventions⁶⁴ by contracting parties that present a united (or near united) front to the Court of the states' desired outcome can be influential. Take, for example, the judgment in *Lautsi v Italy*.⁶⁵ In this case the Court was called to decide whether the mandated display of crucifixes in Italian state schools violated religious freedom under Article 9. The Chamber found a violation; a decision that was poorly received⁶⁶ and referred to the Grand Chamber. Ten states—almost a quarter of the membership of the Council of Europe—intervened to argue that no violation ought to be found and the Grand Chamber overruled the Chamber's judgment. There had been, it held, no violation of Article 9. Of course, one cannot definitively claim that the mass of intervening states determined the outcome; nor is that our argument. However, it is too much to suggest that the mass of interveners did not indicate to the Court the disappointment with which a contrary finding would be received by these states so that judicial innovation might have been reined in. Indeed, the impact that third party submissions have on the Court's decision-making has been explored elsewhere. Petkova argues that 'at least in the area of qualified rights, it appears that the Court is more likely to establish or override its own precedents when transnational actors are also inclined to such

⁶³ 'Trumping internal consensus' is characterised and considered in de Londras and Dzehtsiarou, 'Grand Chamber of the European Court of Human Rights, *A, B & C v Ireland*, Decision of 17 December 2010' (2013) 62 *International and Comparative Law Quarterly* 250.

⁶⁴ ECHR, Article 36.

⁶⁵ *Lautsi v Italy*, supra n 57.

⁶⁶ Joseph Weiler, for instance, characterised the judgment of the Chamber in *Lautsi* as 'an embarrassment'. Weiler, 'Lautsi: Crucifix in the Classroom Redux' (2010) 21 *European Journal of International Law*, available at: www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux [last accessed 29 December 2014]. For a more general reaction see, Hooper, 'Human Rights Ruling against Classroom Crucifixes Angers Italy', *Guardian*, available at: www.theguardian.com/world/2009/nov/03/italy-classroom-crucifixes-human-rights [last accessed 29 December 2014].

developments. Conversely, the ECHR has hesitated to do so and has preserved the status quo in cases where the *amici* briefs significantly diverge'.⁶⁷ Interestingly all third party submissions by states in this case were in favour of a finding of 'no violation', while the NGOs' submissions were diverse (although the majority supported finding a violation of Article 9). If Petkova's suggestion is correct, then the Court may have been influenced by the unanimous submission supporting the no-violation outcome from the contracting parties and thus considered that this was a case in which a restrained approach that would not impact negatively on states' diffuse support was appropriate. Even if levels of interest demonstrated through intervention do not influence the final outcome of a case, a statistical analysis of referral requests to the Grand Chamber since 2011 (when press releases about panel decisions began to be published) suggests that third party intervention by other states or NGOs correlates with a much higher referral acceptance rate (c. 19%) than without (5.16%).⁶⁸

This is not to suggest that the Court will always bend to the will of states or restrain itself simply because of the strength of feeling on behalf of the respondent state. This is illustrated by the emergence in recent years of prisoner voting as an important stress point between the Court and the UK following *Hirst (No 2) v the UK*.⁶⁹ In *Hirst* the Court found that the UK's absolute ban on prisoners voting violates the Convention; a finding that has met with staunch resistance at the domestic level. The UK is not the only European state to ban prisoners from voting, but as Tom Zwart has observed 'the Court used the *Hirst* case against the UK, a high compliance State, as a vehicle for establishing that such a ban is contrary to the Convention'.⁷⁰ Although *Hirst* has not yet resulted in domestic change the principles

⁶⁷ Petkova, *supra* n 10.

⁶⁸ Original data analysis undertaken by Fiona de Londras; data and analysis on file with Fiona de Londras.

⁶⁹ *Hirst (No 2) v the United Kingdom* Application No 74025/01, Merits and Just Satisfaction, 6 October 2005.

⁷⁰ Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done' in Flogaitis, Zwart and Fraser (eds), *The European Court of Human Rights and Its Discontents* (2013) 71 at 80.

established there have been applied in later cases against other contracting parties,⁷¹ reinforcing the innovation introduced in *Hirst*. As regards the relationship between the UK and the ECtHR, however, *Hirst* has been costly; political actors have not been shy in using it as a vehicle for questioning the legitimacy of the Court or even the desirability of the UK remaining as a contracting party to the Convention, indicating a reduction in diffuse support at least at a rhetorical level. It is difficult to suppose that this has not had some influence on recent cases. In spite of the controversial decision in *Vinter and others v the UK*⁷² (finding that life sentences without the possibility of parole violate the Convention), we have begun to see the Court appearing to take domestic sensitivities in the UK into account in other controversial cases in a manner that Helen Fenwick argues amounts to appeasement.⁷³ Three cases seem to suggest this.

In *Abu Hamsa*,⁷⁴ *Austin*⁷⁵ and *Animal Defenders*⁷⁶ we see unexpected decisions that seem to favour the UK's desired approach, even in the face of seemingly clear case law to the contrary. Thus, in *Animal Defenders* the European Court of Human Rights found that the ban on political advertising in the UK did not violate Article 10, even though it had found a violation in the almost identical case of *VgT Verein gegen Tierfabriken v Switzerland*. This did not go unnoticed by the dissenting judges, who wrote:

⁷¹ See, *Scoppola v Italy (No.3)* Application No 126/05, Merits and Just Satisfaction, 22 May 2012, *Anchugov and Gladkov v Russia* Application No 11157/04 and 15162/05, Merits and Just Satisfaction, 4 July 2013.

⁷² *Vinter and Others v the United Kingdom* Application No 66069/09, 130/10 and 3896/10, Merits and Just Satisfaction, 9 July 2013.

⁷³ Fenwick, 'An Appeasement Approach in the European Court of Human Rights?', *UK Constitutional Law Blog*, 5 April 2012, available at: ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights [last accessed 29 December 2014]. See also, Fenwick, 'Post 9/11 UK Counter-Terrorism Cases in the European Court of Human Rights: A 'Dialogic' Approach to Rights' Protection or Appeasement of National Authorities?' in Davis and de Londras (eds) *Critical Debates on Counter-Terrorist Judicial Review* (2014) 302.

⁷⁴ *Babar Ahmad and Others v United Kingdom* Application No 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Merits and Just Satisfaction, 10 April 2012.

⁷⁵ *Austin and Others v United Kingdom* Application No 39692/09, 40713/09 and 41008/09, Merits and Just Satisfaction, 15 March 2012.

⁷⁶ *Animal Defenders International v United Kingdom* Application No 48876/08, Merits and Just Satisfaction, 22 April 2013.

We are particularly struck by the fact that when one compares the outcome in this case with the outcome in the case of *VgT Verein gegen Tierfabriken v Switzerland* the almost inescapable conclusion must be that an essentially identical ‘general prohibition’ on ‘political advertising’ – sections 321(2) and (3) of the 2003 Act in this case and sections 18 and 15 of the Federal Radio and Television Act and the Radio and Television Ordinance respectively in *VgT* – is not necessary in Swiss democratic society, but is proportionate and a fortiori necessary in the democratic society of the United Kingdom. We find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it.⁷⁷

What this suggests, at the very least, is that the ECtHR is acutely aware of the political context in which its decisions are made and, indeed, of the extent to which it is on safe or shaky ground in the eyes of the relevant state party; considerations that become even more acute in situations in which sovereigntist urges might be said to run high. Indeed, the most recent prisoners’ voting rights case tends to reinforce this finding. While the Court maintained its position that the UK violates the Convention through its absolute ban on prisoners voting in the case of *Firth and Others v United Kingdom*,⁷⁸ it also held that a declaration of violation was just satisfaction for non-pecuniary damage so that compensation need not be paid by the respondent state found to be in violation.

B. Managing Sovereigntist Inclinations

While issues that go to a state’s perceived identity bring about a reluctance to submit to international supervision on the part of states, matters that are seen to have existential

⁷⁷ Ibid, Dissenting opinion of Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, at para 1.

⁷⁸ *Firth and Others v United Kingdom* Application No 47784/09, Merits and Just Satisfaction, 12 August 2014.

implications for the state can draw out sovereigntist inclinations. In other words, in relation to these issues states can feel not only inclined but also justified in distancing themselves from international supervision and may instead concentrate on engaging with and within their domestic legal systems, making international courts' supervision of these issues particularly difficult. This is clear from a consideration of the ECtHR's treatment of national security cases and, in particular, its apparent willingness to treat different states somewhat differently in this context. Although most of the cases considered here are drawn from the current counter-terrorist context, this is not a uniquely post-9/11 phenomenon. Rather, this trend has arguably been discernible since the *Greek Case*⁷⁹ in which the Commission, for the first and only time, rejected a government's decision that an emergency within the meaning of Article 15 existed. When seen in the light of the many other cases in which such a declaration was accepted by the Court,⁸⁰ often in what were questionable circumstances,⁸¹ it becomes at least arguable that this had more than a little to do with the fact that the government in Greece at the time comprised a military *junta* and that the Court is more trusting of such (ultimately political) determinations where they emanate from democratically elected governments.⁸² Of course, the different treatment of Greece when compared to other states at the time has itself been identified as undermining the legitimacy of the Court by a number of scholars,⁸³ and if a wide-scale difference of treatment between states were to be clearly and publicly evident that would undoubtedly undermine the Court's legitimacy further. Although it is difficult to pinpoint analogous cases in contemporary jurisprudence, there are some interesting contrasts that can be identified between how different states seem to be treated.

⁷⁹ *The Greek cases*, supra n 56.

⁸⁰ For example *Lawless v Ireland* Application No 332/57, Merits, 1 July 1961; *Brannigan and McBride v the United Kingdom* Application No 14553/89 and 14554/89, Merits and Just Satisfaction, 26 May 1993.

⁸¹ See eg, *A v United Kingdom* Application No 25599/94, Merits and Just Satisfaction, 23 September 1998.

⁸² Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68 *Modern Law Review* 668.

⁸³ See, for example, Gross and ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23(3) *Human Rights Quarterly* 625.

Take, for example, engagement with different states in relation to the (regular or irregular) expulsion of suspected terrorists. The United Kingdom has long been engaged in an attempt to somehow recalibrate the *non refoulement* standard as applied in *Chahal* when it comes to security risks.⁸⁴ Although it did not succeed in having *Chahal* substantively revised through its intervention into *Saadi v Italy*,⁸⁵ the UK has engaged effectively in litigation to ensure that states can deport individuals to other states with questionable human rights records subject to diplomatic assurances or memoranda of understanding.⁸⁶ In spite of the fact that experts such as the UN's Special Rapporteur on Torture⁸⁷ have unequivocally condemned these assurances, the Court has continued to hold that deportation pursuant to such assurances is permissible provided a number of (not particularly onerous) standards are met in relation to them.⁸⁸ Once the relevant assurance is secured the suspect can be deported and, even if *then* subjected to torture or to an unfair trial, the sending state is not responsible. Although (as the Abu Qatada saga illustrates) even this fairly minimal standard has sometimes frustrated the UK's efforts, it is as much as has been demanded by the Court. Thus, the Court has not laid down absolute standards prohibiting the deportation of such suspects to states of this kind; rather it has accommodated the UK's desire for a deportation-heavy approach to counter-terrorism, even in the absence of an Article 15 emergency.⁸⁹

Similarly, the ECtHR has approved of closed materials proceedings in the security context provided only that the 'gist' (whatever that might be) of the case against the suspect

⁸⁴ *Chahal v United Kingdom* Application No 22414/93, Merits and Just Satisfaction, 15 November 1996; see, for example, the arguments of the United Kingdom as intervener in *Saadi v Italy* Application No 37201/06, Merits and Just Satisfaction, 28 February 2008.

⁸⁵ *Ibid.* See, de Londras, 'Saadi v Italy' (2008) 102 *American Journal of International Law* 616.

⁸⁶ *Othman (Abu Qatada) v United Kingdom*, Application No 8139/09, Merits and Just Satisfaction, 17 January 2012, at paras 185-90.

⁸⁷ UNHCHR, Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61st Session of the UN Commission on Human Rights, Geneva, 4 April 2005, at 3, available at: ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3258&LangID=E [last accessed 29 December 2014].

⁸⁸ *Othman (Abu Qatada) v United Kingdom*, supra n 86.

⁸⁹ Although the United Kingdom made a declaration of emergency and derogated from Article 5(1) of the ECHR in 2001 (see The Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644)), that derogation was lifted in 2005.

is revealed to him, in a substantial adjustment of what might be considered to be a basic tenet of a fair trial (the right to answer the case against one⁹⁰), again without the need for an Article 15 declaration of emergency.⁹¹ In respect of the United Kingdom, then, there has been what seems to be a high level of tolerance for repressive counter-terrorist measures introduced and applied in a time of so-called ‘normalcy’.⁹² In contrast, we might note the Court’s unequivocal condemnation of the Former Yugoslav Republic of Macedonia’s involvement in extraordinary rendition in the case of *El-Masri*.⁹³ Here, no tolerance whatsoever was displayed for the apparent exigencies of the situation. We do not mean to suggest that deportation, special advocates or ‘gisting’ are the same as extraordinary rendition, but there can be implications for the same kinds of rights (freedom from torture, right to a fair trial, right to be free from arbitrary deprivations of liberty) in both cases. In spite of this, the Court displays markedly different approaches.

Although not expressly made out in the judgments, non-legal factors seem likely to play a role in the Court’s decision-making processes in cases of such heightened sensitivity. The UK was, and is, a leading state in contemporary counter-terrorism, and rhetorical presentation of human rights as potential interferences with security was clear from the UK’s leadership early on in the post-9/11 *milieu*.⁹⁴ The UK is also a significant actor within the Council of Europe so that its attitudes towards the ECtHR and perceptions of its legitimacy are important and influential for the Court on an institutional level. As one of the founders of the Convention and a significant actor in its development, the marked withdrawal of diffuse

⁹⁰ This is the core guarantee of Article 6 of the ECHR. See, for example, *Pélissier and Sassi v France* Application No 25444/94, Merits and Just Satisfaction, 25 March 1999.

⁹¹ *A v United Kingdom*, supra n 81.

⁹² This term is used here simply to identify a period of time in which there is no officially declared emergency under Article 15, although it does not necessarily imply *actual* normalcy as emergencies can become entrenched and/or *de facto* even in the absence of a *de jure* emergency. On this see, eg, Greene, ‘Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights’ (2011) 12 *German Law Journal* 1764.

⁹³ *El-Masri v the Former Yugoslav Republic of Macedonia* Application No 39630/09, Merits and Just Satisfaction, Judgment of 13 December 2012.

⁹⁴ See generally, de Londras *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (2011), Chapter 3.

support from the UK owing to a perception of the Court's reduced legitimacy could have serious consequences, especially in a high-stakes context such as counter-terrorism. With this in mind, and taking into account the fact that the UK is what Dothan calls a 'high reputation state' in terms of human rights generally (although perhaps not in the counter-terrorist context in particular), a relatively limited amount of judicial innovation by the Court is politically possible in the counter-terrorist context.⁹⁵ Macedonia, in contrast, is in nothing like as powerful a position; here there was more scope for muscularity in relation to counter-terrorism and for a clear standard to be established relating to a state's involvement with the extraordinary rendition programme. After that case there was relatively little risk for the Court in concretising those standards in similar cases that came before it against Poland;⁹⁶ the constitutionalist heavy-lifting had been done by means of judicial innovation in the lower risk context of *El-Masri*.

This analysis may seem to set up a paradoxical claim: that the Court can 'use' the UK to set certain standards because it is a high reputation and high compliance state while at the same time being keen to exercise more self-restraint and not to go too far in the cases against the UK. This simply reflects the fact that the subject matter and timing of a judgment can be important factors to be taken into account by the Court, *as well as* the nature of the respondent state.

As the UK is a high reputation state, the Court seems understandably anxious to keep it on board to ensure that it remains the pathway for certain judicial innovations. The UK is arguably likely to comply, even with adverse judgments.⁹⁷ This, then, reduces the risk

⁹⁵ Dothan 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chicago Journal of International Law* 115.

⁹⁶ *Al Nashiri v Poland* Application No 28761/11, Merits and Just Satisfaction, 24 July 2014; *Husayn (Aby Zubaydah) v Poland* Application No 7511/13, Merits and Just Satisfaction, 24 July 2014.

⁹⁷ Indeed, even as regards prisoner voting which has ignited such debate about the appropriate relationship with the Strasbourg Court, the Voting Eligibility (Prisoners) Draft Bill presented to Parliament in November 2012 forwarded three options, one of which was maintenance of the absolute ban on voting and the other two of which reduced this to a partial ban (either for those sentenced for 6 months or more or those sentenced for 4

associated with handing down such judgments *and* allows for the development of a situation in which costs of *non-compliance* became high because an expectation would develop that judgments would be complied with. This is not to suggest that the UK or other high reputation states would inevitably comply, or would do so ungrudgingly, for this is subject to the third factor that must be borne in mind: the nature of the issue at hand. There will inevitably be issues on which a state holds such a particularly firm view that the risk of being innovative is especially significant, as we have seen above. In others, judicial innovation may seem a less costly exercise.

5. CONSENSUS DECISION-MAKING

Consensus decision-making by the ECtHR is a further mechanism by which the Court manages judicial innovation, in this case by means of the interpretive approach it deploys. This relates to the use by the Court of a determination of so-called ‘consensus’, often between contracting parties but also sometimes on a more international level, as to a particular issue in order to determine whether or not the Convention can be interpreted as providing the protection claimed.⁹⁸ Consensus decision-making is a mechanism of managing judicial innovation when it is used by the Court in an attempt to reconcile evolution of the Convention through judicial innovation with original consent.⁹⁹ In these cases, the reasoning of the Court draws on the experiences and approaches of contracting parties and their counterparts, as well as on fields of specialised knowledge at times, in order to develop the content and meaning of Convention provisions. Thus, the Court tries to enhance its

years or more). While this Draft Bill remains just that, this indicates that non-compliance is *in practice* a somewhat uncomfortable prospect for the Government. See, Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ (2014) 14 *Human Rights Law Review* 503.

⁹⁸ On European consensus generally see, Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015), Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ (2011) Public Law 534; Dzehtsiarou, ‘European Consensus: A Way of Reasoning’ (2009) 11 *University College Dublin Law Research Paper*, available at: ssrn.com/abstract=1411063 [last accessed 29 December 2014], Wildhaber, Hjartarson and Donnelly ‘No Consensus on Consensus? The Practice of the European Court of Human Rights’ (2013) 33 *Human Rights Law Journal* 248.

⁹⁹ See, Dzehtsiarou, *supra* n 2.

legitimacy through deployment of European consensus¹⁰⁰ in the course of developing Convention law.

As considered above, original consent is often conceptualised as a main source of legitimacy in the areas of international law¹⁰¹ and international adjudication.¹⁰² In other words, a state will accept an international standard's bindingness or the decision of an international court or tribunal because it has consented (either through ratification of a treaty or by not mounting consistent objection to custom) to being thus bound. However, a conception of original consent that meant that states were bound only to what the law was—and was understood to be—at the time of ratification would stymie the development of the international legal system; it would suggest in a narrowly construed way that only decisions that could have been anticipated by the originators of the system in question can be considered legitimate.¹⁰³ The ECtHR does not take an originalist approach to the Convention. Rather, recognising its special character as a human rights treaty¹⁰⁴ and its purpose of securing effective rights protection, it has long committed to evolutive interpretation taking social and legal developments into account. A few examples serve to illustrate this point.

¹⁰⁰ See, Dzehtsiarou, Does Consensus Matter?, supra n 98.

¹⁰¹ Classical international law tradition suggests that the legitimacy of international law is grounded in the consent of States. See, Kumm, 'The legitimacy of international law: a constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 914; O'Rahilly, 'The Sovereignty of the People' (1921) 37 *Studies: An Irish Quarterly Review* 49; Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law* (2010) at 13.

¹⁰² Macdonald, a former judge of the ECtHR, has pointed out that the whole system of European human rights protection 'rests on the fragile foundations of the consent of the Contracting Parties'. Macdonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (1993) 83 at 123.

¹⁰³ This approach has a number of supporters in the US especially in relation to the US Supreme Court. See, e.g. Bork who argues that there has been a politisation of law, leading to a decline in the perceived legitimacy of legal institutions, and therefore, proposes to base judicial analysis on the premises of original understanding of the US Constitution. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

¹⁰⁴ See, e.g. *Loizidou v Turkey* Application No 15318/89, Admissibility, 23 March 1995, where the Court emphasised 'the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings'; *Bankovic and Others v Belgium and Others* Application No 52207/99, Admissibility, 12 December 2001. See also, Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 *International and Comparative Law Quarterly* 217.

In *Ünal Tekeli v Turkey* the Court was called upon to decide whether a provision of Turkish legislation preventing women from keeping their maiden names after getting married violates Article 8, taken in conjunction with Article 14 of the Convention. The Court found a violation in this case after stating that ‘[o]f the member states of the Council of Europe Turkey is the only country which legally imposes – even where the couple prefers an alternative arrangement – the husband’s name as the couple’s surname and thus the automatic loss of the woman’s own surname on her marriage’.¹⁰⁵ It is undeniable that equality of sexes is an important constitutional principle and value of the Convention; consensus decision making in this case offered an avenue for promoting this principle. Other constitutional principles were set and supported by consensus in such cases as *Tănase v Moldova*,¹⁰⁶ where the Court found a violation of passive electoral rights of people with dual citizenship, and in *Republican Party of Russia v Russia*¹⁰⁷ in which the Court found consensus against the prohibition of regional parties and found a violation of the Convention in this case.

While these are examples of cases where consensus has been the basis for judicial innovation, consensus—or rather the lack thereof—has also formed the basis for judicial self-restraint. *SH and others v Austria*¹⁰⁸ provides an excellent example, although it is by no means the only one.¹⁰⁹ *SH* concerned the use of donor sperm and eggs for *in vitro* fertilisation, which is forbidden by Austrian law. The First Section had held that this violated Article 8 of the Convention when read in conjunction with Article 14; but the Grand Chamber reversed this decision, making it quite clear that one of the major argumentative rationales for doing so was the lack of a consensus on the matter. Noting that the question

¹⁰⁵ *Ünal Tekeli v Turkey* Application No 29865/96, Merits and Just Satisfaction, 16 November 2004, at para 61.

¹⁰⁶ *Tănase v Moldova* Application No 7/08, Merits and Just Satisfaction, 27 April 2010, at paras 171-80.

¹⁰⁷ *Republican Party of Russia v Russia* Application No 12976/07, Merits and Just Satisfaction, 12 April 2011.

¹⁰⁸ *S.H. and Others v Austria* Application No 57813/00, Merits and Just Satisfaction, 3 November 2011.

¹⁰⁹ See, *Vo v France* Application No 53924/00, Merits and Just Satisfaction, 8 July 2004, *Van der Heijden v Netherlands* Application No 42857/05, Merits and Just Satisfaction, 3 April 2012.

before it raised ‘sensitive moral and ethical issues’¹¹⁰ on which ‘there is not yet clear common ground amongst the member States’,¹¹¹ the Court found that there was no violation as there was no European consensus to support such a conclusion. This is notwithstanding the point that, in fact, there is an *emerging* consensus permitting the use of donor sperm, in particular, for *in vitro* fertilisation. The Court, however, held that this ‘emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State’;¹¹² thus it was not sufficient as a basis to support the evolutive step the First Section had taken. Here, then, the Court used consensus decision-making to support a self-restrained decision, as indeed it did in *A, B & C v Ireland* as discussed earlier. *SH and others v Austria* also suggests a consciousness on the part of the Court around exercising self-restraint in this way, with the Court noting that its task, especially in morally sensitive areas, ‘is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation’.¹¹³

Thus, the consensus approach is incremental but also sometimes uneven; a point we return to below. However, as an approach to the interpretation of the Convention it clearly allows the Court to both put into action the mandate from the preamble to the Convention to achieve greater unity between the Convention’s members by the development of common understandings as rights, *and* enables a (sometimes tenuous) tethering of evolution to original consent. In this way, the legitimacy questions that arise from judicial innovation can be answered while constitutionalism is nurtured.

6. SOME IMPLICATIONS OF MANAGING JUDICIAL INNOVATION

¹¹⁰ *S.H. and others v Austria*, supra n 108.

¹¹¹ Ibid. at para 97.

¹¹² Ibid. at para 96.

¹¹³ Ibid. at para 92.

We have outlined above three trends that we argue can be read as managing judicial innovation in the European Court of Human Rights, and which taken together constitute a nascent model of judicial self-restraint. If this reading is accurate it has a number of implications of relevance to both the development of the Convention itself and the relationship between the Court and other stakeholders.

If, as we suggest above, the Court sometimes takes cognisance of non-legal factors including the possible implications for its own position of taking an innovative approach to a question before it, it may well be susceptible to capture. In other words, there is a possibility that in either deciding whether to hear the case at all or in reaching its final decision on a case the Court may take into account contracting parties' reactions and allow this to influence the outcome unduly. Although this is and ought to be of concern, it is also part and parcel of the Court's subsidiary character.¹¹⁴ Subsidiary courts are different, by their very nature, than are domestic apex courts; they step in to adjudicate in situations where the domestic system—which is the primary adjudicatory mechanism—has already dealt with a matter in some way. In this respect subsidiary courts have a limited jurisdiction and might be said to be *expected* to take states' reactions into account. This is due not only to the precarious nature of subsidiary courts and their reliance on states, but also the design of international courts. It is important to say that vulnerability or susceptibility to capture does not mean that the Court never makes decisions that are unpopular with respondent states; indeed, we know that this is absolutely not the case. It means, rather, that such decisions are not taken lightly or that the Court is not unaware of the possible implications of its decisions so that they are carefully considered and weighed.

This suggests that cases where judicial innovation is on display and, particularly, where the Convention has been developed raise questions or issues that the Court considers to

¹¹⁴ The increased importance of subsidiarity was the leitmotif of the Brighton Declaration 2012. The subsidiary character of the ECtHR will appear in the Preamble to the Convention after Protocol 15 enters into force.

be of sufficient constitutionalist significance to bear the costs of innovation. In all likelihood these are not trivial matters, but rather ones that are seen as implicating important questions of rights, participation and democratic values. This can help to explain why the Court may appear to ‘antagonise’ states in relation to matters that the states in question have already set out a quite clear stall on. Take, for example, prisoner voting. One might wonder why the ECtHR has, in at least some people’s eyes, decided to ‘pick a fight’ with the UK government on this issue, particularly as finding that blanket bans on prisoner voting constituted a violation required some innovation in relation to the text of the Convention. The answer, it seems to us, must lie in the Court’s conviction that voting is a key element of democratic participation so that—while the right to vote can be curtailed—any restriction on it must be justified by reference to the circumstances and that imprisonment does not, *per se*, suffice in this respect. The very fact that the Court has remained resolute in its core claim from *Hirst* (that voting rights cannot be automatically stripped from all those incarcerated), even while allowing for very significant restrictions in *Scoppola (No 3)*,¹¹⁵ implicitly indicates that it considers voting to be a matter of sufficient constitutionalist importance to risk damaging the relationship with the UK. This ought, ideally, to trigger reflection in the domestic system about the rationales for and justifiability of the absolute ban, recognising that associated costs mean the Court is unlikely to risk innovation in a trivial matter. Thus, some relationship between degrees of innovation and constitutionalist significance might be discernible.

This, of course, is not unproblematic for it suggests also an inverse relationship whereby issues in relation to which little innovation has been forthcoming are implicitly deemed not to be of constitutionalist significance at European level. An uneven constitutionalism then emerges, whereby some issues receive sustained attention and are developed by means of judicial innovation and others are seemingly marginalised or left

¹¹⁵ *Scoppola v Italy (No 3)*, supra n 71.

largely to states themselves to determine. In many cases these marginalised issues, which might be read as being of lesser constitutionalist significance, lie squarely on the borderlines between personal, state and regional power, such as abortion. Thus, matters of reproductive autonomy are readable as being insignificant to the constitutionalist for they do not seem to merit the cost of progressive judicial innovation.

On our reading of the jurisprudence of the Court, then, uneven constitutionalism emerges at least partially from quasi-arithmetic assessments of cost in terms of diffuse support that are inherent to judicial self-restraint through the management of judicial innovation. While such assessments can be deployed to shore up support on the part of contracting parties, they have potentially opposite effects in the case of other stakeholders such as NGOs and rights bearers who may begin to lose faith in the Court's capacity and willingness to address the violation of their rights. Although it seems extremely unlikely that this would result in a significant reduction in cases brought to the Court for resolution, it may be the case that people who can do so will turn increasingly to the Charter of Fundamental Rights of the EU for the resolution of rights violations where EU law is involved¹¹⁶ so that the Court would find itself less frequently to the forefront of the development of the European public order.

7. CONCLUSIONS

Judicial innovation is crucial to the development of the European Convention on Human Rights, but this does not mean that it does, can or must be present in every case upon which the Court adjudicates. Given the subsidiary and international nature of the Court,

¹¹⁶ In some jurisdictions it is arguably already more sensible to involve EU law instead of ECHR even in cases of human rights violations. Fontanelli points out that 'Italian judges are not allowed to set aside domestic acts colliding with the Constitution or the ECHR. Hence, disapplication of the domestic provision [is] not warranted unless the statute [can] be found at variance also with the third C-source, the EU Charter. ... the judge also [has] to find, at least, that the Italian norm [falls] under the scope of application of EU law.' Fontanelli, 'National Measures and the Application of the Charter of Fundamental Rights to National Measures - Does curia.eu Know iura.eu?' (2014) 14 *Human Rights Law Review* 231.

constitutionalist development of the Convention through judicial innovation necessarily creeps only slowly in the European Court of Human Rights. Even then, the speed at which it creeps, the areas in which it occurs, and the reaction to same from contracting parties are all matters that must be taken into account by the Court when determining the extent to which to be innovative in any particular case. In this paper we have argued that some mechanisms of managing judicial innovation are, thus, required. We contend that in trying to engage in progressive constitutionalism while maintaining the diffuse support of contracting parties the ECtHR exercises judicial self-restraint by carefully managing its docket, being cognisant of non-legal factors of importance to and within the states, and selectively deploying consensus decision-making to determine the speed of change. This can, in some cases, mean that outcomes are reached that create an uneven constitutionalism and are somewhat unsatisfactory from the perspective of litigants and the human rights community, who tend to expect the Court to engage as fully as possible in the advancement and development of rights. However, without a somewhat pragmatic and self-restrained approach, the negative consequences of judicial innovation and such constitutionalist urges may run the risk of undermining states' support for the Court and would, in turn, be detrimental to the Court in trying to maintain its effectiveness in rights protection on a broad scale. As a result, as outlined above, our claim is that the Court carefully manages judicial innovation through a nascent model of judicial self-restraint.

This conclusion is not necessarily in accordance with the views of judges and lawyers within the Court itself.¹¹⁷ When interviewed, Michael O'Boyle, the deputy registrar of the Court, for instance, pointed out that

¹¹⁷ This section reflects perspectives expressed in a number of interviews with one of the co-authors during the course of his doctoral and post-doctoral research in which the matters of legitimacy, evolution and consensus arose.

I do not think that the Court thinks about the execution of judgments when it adopts them. The only thing that the Court has in the back of its mind is what the right result is, and that there is a solid basis in the legal reasoning for its conclusions.¹¹⁸

Along similar lines, former judge of the ECtHR Malinverni pointed out that ‘the possibility for the state to execute the judgment is not a major argument for us. We try to see only whether there is a violation of human rights or not’.¹¹⁹ Judge Garlicki expressed a more nuanced position pointing out that the judges try to think realistically about their judgments, ‘maybe not in a sense of political propaganda; that the judgment should be written in a way that will not provoke conflict’.¹²⁰

These perspectives from inside the Court might suggest that the management of judicial innovation is not explicitly discussed by the members of the court, but that does not mean that docket management, cognisance of non-legal factors, and consensus decision-making are not management mechanisms. When viewed in this light, the continued deployment of the Court of these strategies—notwithstanding their possible negative implications—can be understood as part of the Court’s larger work in securing effective rights protection in spite of its somewhat precarious institutional position.

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¹¹⁸ Dzehtsiarou, Interview with Michael O’Boyle (2009).

¹¹⁹ Dzehtsiarou, Interview with Judge of the ECtHR Giorgio Malinverni (2009).

¹²⁰ Dzehtsiarou, Interview with Judge of the ECtHR Lech Garlicki (2009).